FILED

(1) No. 95-396 SEP 7 1995

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1995

ANTHONY E. JIMINEZ,

Petitioner,

v.

MARY WASHINGTON COLLEGE;
PHILIP HALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the United States Court of Appeals for the Fourth Circuit's decision reversing the United States District Court for the Fourth Circuit finding that Mary Washington College ("MWC") discriminated against a college professor seeking tenure on the basis of race and national origin under Title VII and 42 U.S.C. Section 1983 on grounds that the factual findings of the district court are clearly erroneous.

DESIGNATION OF THE PARTIES

Parties to the proceeding in the court whose judgment is sought to be reviewed include Anthony E. Jiminez, Mary Washington College and Philip Hall("Hall"). There are no parent companies or non-wholly owned subsidiaries.

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Pullman-Standard, Div. of Pullman, Inc. v. Swint, 456 U.S. 273, 72 L. Ed.2d 66, 102 S.Ct. 1781 (1982) 16

Appeals for the Fourth Circuit decided on June 9, 1995.

OPINIONS BELOW

The United States District Court for the Eastern District of Virginia issued Findings of Fact and Conclusions of Law, dated April 15, 1994, along with an Interim Order, also dated April 15, 1994 in favor of Jiminez on both his Title VII and 1983 claims of race and national origin discrimination. The case was bifurcated into liability and damages and on June 1, 1994, the United States District Court for the Eastern District of Virginia issued its Findings of Fact and Conclusions of Law regarding the damages portion of the trial. Jiminez was awarded $15,000.00 and attorney's

fees and costs. A Final Order was entered on June 1, 1994.

JURISDICTION

The United State Court of Appeals for the Fourth Circuit decided this case on June 9, 1995. This Court has jurisdiction to review this judgment by petition for writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

(a) Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment.

(b) 42 U.S.C.A. Section 1983, which provides:

> that every person who, under color of any statute, ordinance, regulation...of any State...subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction...to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured.

(c) Federal Rules of Civil Procedure 52(a):

> Findings of facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

(d) 42 U.S.C.A. 1981:

> All persons...shall have the same right...to make and enforce contracts...and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

STATEMENT OF THE CASE

Jiminez filed a complaint in the United States District Court for the Eastern District of Virginia alleging race and national origin discrimination in violation of Title VII and 42 U.S.C.A. Sections 1981 and 1983 against

Mary Washington College and Philip Hall.

After a two-day bench trial on February 14-15, 1994, the District Court rendered its Findings of Fact and Conclusions of Law. Each finding was supported by testimony and/or documentary evidence. The District Court found that Jiminez had applied for a tenure track position as a member of the Department of Economics at MWC, and as part of that process had interviewed with Hall.

Based upon the testimony of Hall and exhibits presented at trial, the District Court founds that faculty performance, as determined by the Faculty Handbook is evaluated in three areas: teaching, scholarly/creative/professionalactivity, and service. Teaching effectiveness is measured by a variety of factors, including student evaluations and

evaluations by colleagues, the department chair, self-evaluation, attainment of course outcome objectives and maintenance of academic standards. Promotion and tenure decisions are measured by these criteria.

The District Court found, based upon documentary evidence that MWC is predominantly white, with only 3% minority representation in 1983. Additionally, the District Court found based upon exhibits, that of 148 full-time faculty at MWC in 1989, when Jiminez was employed, only 6 Black faculty was tenure-eligible and 2 were non-tenure eligible.

Based upon testimony and documentary evidence, the District Court found a climate of racial tension at MWC, evidence by death threats to Black

students and negative student evaluations to faculty member Karen Williams based on her race.

In comparing Jiminez to Steven Greenlaw ("Greenlaw"), a white tenured professor in the Economics Department, the District Court found that neither Jiminez nor Greenlaw completed the requirement of a Ph.D.; that neither Jiminez or Greenlaw published in a peer-refereed journal; and the major difference between the two lay in student evaluations, which were low for Jiminez and above average for Greenlaw. The District Court based these findings on testimony and exhibits.

Based upon testimony and letters, the District Court found that there was collusion to skew Jiminez' student evaluations for the first through the

fifth semesters based upon his race, accent and mannerisms. The District Court further found, based on testimony, that Hall and Anderson were aware of assertions of collusion and racial and national origin animus toward Jiminez, but nevertheless considered those evaluations in denying Jiminez tenure.

Based upon these facts, the District Court found that Jiminez had met his burden of proof under Title VII and Section 1981. The District Court further found that the reasons given by MWC, i.e., (1) that Jiminez' student evaluations over five semesters were poor; (2) that he had not successfully defended his dissertations; and (3) that he had not produced scholarly works was " unworthy of credence" and merely a pretext for discrimination. In support

of this position, the District Court referred to the tainted student evaluations and Greenlaw's shortcomings while still receiving tenure.

The District Court further found that Jiminez had proved his case under Section 1983 and that Hall was acting under color of state law in denying Jiminez tenure based upon his race and national origin.

The United States Court of Appeals for the Fourth Circuit, however, has chosen to determine its own facts in this case. In its decision, the Court of Appeals found "that there was no evidence of racial animus" in the student evaluations. The Court of Appeals also found that the reasons for Jiminez' tenure denial were (1) five semesters of consistently poor student evaluations;

(2) Jiminez' failure to receive his Ph.D.; (3) shortcomings revealed by a survey indicating negative comments and characterizing Jiminez as very weak; (4) that Jiminez had no faculty support; and (5) that Jiminez experienced difficulty completing material. No references to the record are made in support of these assertions by the Court of Appeals.

ARGUMENT

The Court of Appeals Reversal On Grounds of Clearly Erroneous Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings As to Call For an Exercise of This Court's Supervisory Power.

The Court of Appeals reversed the District Court based upon the "avenue by which the district court arrived at its factual findings". First, the Court of

Appeals dismissed the district court's conclusion that the student evaluations were tainted by racial animus and collusion stating that "[t]hese letters and testimony are nothing but rank speculation and are far too insubstantial to give rise to the inference that for five semesters Jiminez incurred poor student evaluations because of collusive discrimination based on an unlawful animus by some white students." Based on this analogy, the Court of Appeals concluded that the district court erred because its finding that the first five semesters were tainted was not supported by substantial evidence and because the district court failed to consider "substantial evidence" from a former student of Jiminez, who said Jiminez was

ineffective and generally a poor professor.

While the Court of Appeals cited the appropriate law, it failed to adhere to it. Rule 52(a) of the Federal Rules of Civil Procedure provides:

> [A] finding by a district court may be set aside as clearly erroneous when, although there is evidence to support it, if the reviewing court is left with the definite and firm conviction that a mistake has been committed; however, if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the reviewing court may not reverse it, even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently; this is so even when the District Court's findings do not rest on credibility determinations but are based instead on physical or documentary evidence or inferences from other facts.

(Emphasis Added). Anderson v. City of Bessemer City, North Carolina, 470 U.S.

564, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1984).

The question is then whether the district court's account of the evidence is plausible in light of the record viewed in its entirety. The district court, unlike the court of appeals, supported its factual findings with references to both testimony and documentary evidence. Given the racial tension and background at MWC, the district court's finding that the student evaluations were tainted for five semesters is more than plausible.

Anderson chided courts of appeals in applying the clearly erroneous standard to findings of district courts to "constantly have in mind that their function is not to decide factual issues de novo." Id. at 573. The court of

appeals in this case has done just that, decided the facts of this case, without benefit of assessing testimony or witnesses, de novo. Anderson, likewise stated "deference" to the trier of fact is the rule, not the exception. Just as in Anderson, the Court of Appeals improperly conducted what amounted to a de novo weighing of the evidence in the record.

Secondly, the court of appeals finds that the comparison of Jiminez to Greenlaw was "flawed"; and therefore Jiminez should not prevail in overcoming the pretext for discrimination. The court of appeals reasons that this is so because when Greenlaw was hired in 1982, having a Ph.D. was not a requirement for promotion. Once again, the court of appeals gives no reference to this

information or even if this information was adduced at trial. Even if it was, the district court noted that the faculty handbook had undergone many revisions, making it difficult to ascertain applicable provisions at any given time.

The court of appeals also notes that Greenlaw had superior student evaluations and the support of the Economics Department. However, taking the case in its entirety and the racial tension and animosity that existed, the district court's findings seem far more plausible than the court of appeals' attempted findings, which totally disregard the racial composition of MWC and other factors relating to the racial atmosphere at MWC.

Finally, the court of appeals concludes that the district court's

conclusions is erroneous because it failed to consider other substantial, contrary evidence relating to white professors terminated for failure to complete the Ph.D. requirement; and the fact that there is a Black Chairman of the Physics Department. It cannot be said that the district disregarded these facts. It is ultimately up to the district court in determining the facts, how much weight to attach to evidence.

The court of appeals must give due deference and respect to the trier of fact. The obligation of the court of appeals to accept factual findings and inferences of a district court was further noted in Pullman-Standard, Div. of Pullman, Inc. v. Swint, 456 U.S. 273, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982).

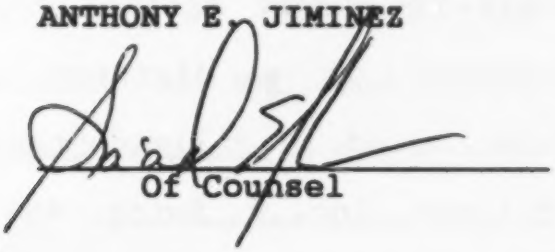
The facts as found by the district court, and viewed within the case as a whole support the conclusions of the district court and are supported by the evidence.

CONCLUSION

Because the district court's findings of fact are supported by the evidence, the district court's decision was not clearly erroneous. Petitioner prays that this Court grant a Writ of Certiorari to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ANTHONY E. JIMINEZ



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Petition for Writ of Certiorari was mailed postage prepaid to James S. Gilmore, III, Attorney General and Guy W. Horsley, Jr., Assistant Attorney General, Office of the Attorney General, 900 East Main Street Richmond, Virginia 23219 this the 7th day of September, 1995.